Supreme Court, U.S.
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No. 93-471

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

COY U. SPAWN, JR.,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

REPLY BRIEF OF THE PETITIONER

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I. The Interest Issue.

The issue is whether the waiver of sovereign immunity effected by the FDIC's "sue and be sued" clause includes normal incidents of suit, including interest. Petitioner and the government agree that the Fifth Circuit's opinion hinged on whether Congress launched the FDIC and FSLIC "into the commercial world". (Opposition Brief, pp. 5 & 8). The government agrees with Petitioner that there is a conflict among the Fifth, D.C., and Federal Circuit Courts of Appeals on this issue. (Opposition Brief, pp. 9-11). The government attempts to distinguish these cases by the specific facts, but cannot distinguish the controlling issue (waiver of sovereign immunity from the normal incidents of suit) or the determinative answer (whether the FDIC and FSLIC were launched into the commercial world) among these cases. *Spawn v. Western Bank - Westheimer & Federal Deposit Ins. Corp.*, 989 F.2d 830, 838 (5th Cir. 1993) (hereinafter *"Spawn II"*); *Far West Federal Bank v. Office of Thrift Supervision*, 930 F.2d 883, 888-889 (Fed. Cir. 1991); *North New York Sav. Bank v. Federal Sav. & Loan Ins. Corp.*, 515 F.2d 1355, 1364 (D.C. Cir. 1975).

Regarding *North New York Savings Bank*, the Fifth Circuit specifically recognized a conflict on this issue. *Spawn II*, 989 F.2d at 838 and n. 11.

The government's arguments in the Opposition Brief highlight the need for this Court to clarify the application of *Loeffler*. *Sandia Oil* involved an agency not enacted by or provided with a sue-and-be-sued clause. The Tenth Circuit's holding that the absence of a sue-and-be-sued clause is not determinative of the "commercial enterprise" exception to sovereign immunity exemplifies the circuit courts' misunderstanding of *Loeffler*. *Sandia Oil Co., Inc. v.*

Beckton, 889 F.2d 258, 262 (10th Cir. 1989); *cf. McGehee v. Panama Canal Comm'n.*, 872 F.2d 1213, 1218 (5th Cir. 1989). *Philadelphia Gear* involved only a *Shaw* express waiver analysis and did not discuss the "commercial enterprise" exception to waiver of sovereign immunity. *Philadelphia Gear Corp. v. Federal Deposit Ins. Corp.*, 751 F.2d. 1131 (10th Cir. 1984), *rev'd on other grounds*, 476 U.S. 426, 106 S.Ct. 1931, 90 L.Ed.2d 490 (1988).

Application of *Loeffler* is unclear regarding the limitation on paying interest "... to the extent that interest is recoverable against a private party as a normal incident of suit." *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1945, 1970, 100 L.Ed. 2d 549 (1988). The government's position is that Mr. Spawn could not be entitled to interest because: the Administrative Procedure Act applies procedurally to Mr. Spawn's suit for recovery of deposit insurance and does not include a specific authorization for the recovery of interest; and a suit for federal deposit insurance is not available against a private party. The effect of the government's position is that when the Administrative Procedure Act applies procedurally to any cause of action versus the government, the prevailing party automatically is not entitled to interest. Petitioner's interpretation is to analyze the cause of action as if a private party was the defendant. For example, in this Case, if the bank had not been closed, the bank and not the FDIC would have been the defendant liable on the deposit. The cause of action is for failure to pay on a certificate of deposit which matured and became due. Under Texas law, when a depository institution fails to pay a matured certificate of deposit, pre-judgment interest must be paid as a matter of law. The importance of clarifying *Loeffler* extends to all governmental "sue-and-be-sued" agencies.

II. The EAJA Issue.

The EAJA issues presented to this Court in this Case involve the standard of review and burden of proof on "substantial justification" for a governmental agency's position which has been reversed on the merits as "arbitrary and capricious" or "not in accordance with the law". It is the application of the "abuse of discretion" standard of review which is at issue. The government's Opposition Brief reinforces that this Court should grant certiorari on these EAJA issues, which are encompassed by four cases. *Federal Election Comm'n v. Political Data Contributions Data,* 995 F.2d 383 (2d Cir. 1993); *Spawn v. Western Bank - Westheimer & Federal Deposit Ins. Corp.*, 989 F.2d 830 (5th Cir. 1993); *Oregon Natural Resources Council v. Madigan*, 980 F.2d 133 (9th Cir. 1992); *Sierra Club v. Secretary of Army,* 820 F.2d 513 (1st. Cir. 1987). These four cases reflect a variance among the circuit courts of appeals on the degree of deference which must be accorded a district court's EAJA findings of fact on "substantial justification" for a government's position,[1] which has been reversed as being

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[1] In *Oregon Natural Resources Council v. Madigan*, the government lost on the merits for failing to issue regulations in violation of a statute which set forth a mandatory duty to issue such regulations. On remand, the district court held that the government's position was "substantially justified". The Ninth Circuit did not defer to this EAJA finding and reversed. "[W]e find that the underlying position of the government was not substantially justified. We come to this conclusion not because the government lost its claim, but because a previous panel of this court determined that the statutory language and legislative history were clear." 980 F.2d at 1332.

In *Federal Election Comm'n v. Political Data Contributions*, the court of appeals held against the government on the merits on grounds that the Federal Election Commission failed to provide "a reasonable interpretation" of its own regulation or the controlling statute and that the government's interpretation likely violated the First Amendment of the

"arbitrary and capricious" or "not in accordance with the law".[2]

The key to reconciling these four circuit court opinions may be in the plain language of the 1985 amendments to the EAJA statute.

United States Constitution. On remand, the District Court held that the government's position was "substantially justified". The Second Circuit did not defer to the district court's EAJA ruling and reversed. The majority's reasoning was: (1) on the merits the court of appeal's ruled that the Federal Election Commission's interpretation of its regulation was "unreasonable"; (2) under the EAJA, the test for "substantial justification" is one of "reasonableness"; (3) therefore, the EAJA finding is bound by the finding on the merits. "[T]he legal standards which govern the merits phase of this litigation are precisely those to be applied to the EAJA question." 995 F.2d at 386.

[2]In this Case, the merits of whether Mr. Spawn was entitled to deposit insurance from the FDIC hinged on statutory construction. On the merits, the Fifth Circuit held in *Spawn I* that the regulation "plainly establish[ed] a different test" from the FDIC's policy, and that the FDIC's litigation position was contradicted by the "unambiguously expressed" terms of the regulation. *Spawn v. Western Bank Westheimer,* 925 F.2d 885, 888 & 889 (5th Cir. 1991) On remand, the District Court ruled that on the evidence presented at the EAJA trial the FDIC did not prove substantial justification. Thus, the District Court relied on the previous Court of Appeals' merits ruling. (See Petition Appendices B and D). In *Spawn II*, the Fifth Circuit: (1) accorded no weight to the District Court's finding that the FDIC did not meet its burden of proof that its position was substantially justified; and (2) determined *de novo,* by recharacterizing the previous panel's holdings, that the government was substantially justified. *Spawn II*, 989 F.2d at 840.

In direct conflict, the First Circuit Court of Appeals in *Sierra Club* deferred to the District Court's finding on virtually identical facts that the governmental agency had not met its burden of proof on "substantial justification" of an agency position which was held to be "arbitrary and caprici2ous". 820 F.2d at 518.

> Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. § 2412(d)(1)(B).

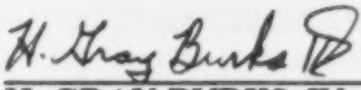
Therefore, the issue of deference to the District Court's EAJA fact findings on whether the government met its burden of proof on "substantial justification" is a question of strict statutory construction.

The government suggests that this Court hold the Petition for a Writ of Certiorari in *Spawn II* pending the Petition for Certiorari which the government intends to file in the Second Circuit Case *Federal Election Comm'n v. Political Contributions Data*. Both cases involve the disparity with which circuit courts of appeals are applying the "abuse of discretion" standard in EAJA cases. However, the Second Circuit opinion turns on the issue of whether the "reasonable interpretation" standard applicable to the merits of the *Federal Election Commission* case was identical to the "reasonableness" standard on the EAJA issue. *Spawn II* involves initially the interplay between the "arbitrary and capricious" or "not in accordance with law" standard with the "substantially justified" standard. More importantly, the record in this Case (see Petition Appendix D) engages the overall "degree of deference" issue which the narrow basis for the Second Circuit's reversal of the district court in *Federal Election Commission* does not.

CONCLUSION/PRAYER

For the foregoing reasons, Mr. Coy U. Spawn, Jr. respectfully requests this Court to grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the two issues presented in this Case.

Respectfully submitted,



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